81-617

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

DAVID D'ANGELO,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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QUESTION PRESENTED

Whether a defendant, charged with three serious federal felonies, receives his Constitutional right to the effective assistance of counsel so long as his trial is not a "farce and mockery", or whether he is entitled to the assistance of an attorney who is reasonably competent and loyal to his client.

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The petitioner, David D'Angelo, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on May 22, 1981.

OPINION BELOW

The opinion of the Court of Appeals is reproduced in the appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on May 22, 1981. A timely petition for rehearing was denied on July 29, 1981. Jurisdiction is invoked under 28 U.S.C. § 1254 (1).

STATEMENT OF THE CASE

Petitioner was indicted with eight other defendants in a twelve count indictment charging various narcotics offenses in the Southern District of New York. Count 1 named petitioner in a conspiracy count alleging narcotics distribution; count 9 charged him and others with distributing 118.85 grams of heroin on August 1, 1980; count 10 charged him and others with distributing 118.71 grams of heroin on August 14, 1980. All defendants other than petitioner pled guilty prior to or immediately after jury selection. Following the guilty pleas, petitioner asked the court for a continuance to obtain new retained counsel because his counsel had told him shortly before that if petitioner didn't listen to him he would "quit". As a result, said petitioner, "I don't think . . . he'll defend me properly." (H.1985).[1] Without inquiring further into the facts, the district judge announced that the trial would begin the following morning and that if petitioner wished to change counsel, he should have new counsel "here tomorrow morning at 10:00 prepared to defend you." (H. 1985-6).

The following morning, petitioner appeared with previous counsel and a proposed substitute, who advised the court that as a result of his conversations with petitioner, it appeared that he and his then counsel, Mr. Stone, "were ready to part company" (DA 3).[2] He further asserted that in his opinion there was "an affirmative defense" which had not been prepared and which he thought would require two weeks of preparation (DA 4-7). He offered to disclose the defense "in camera" but the court declined to hear it (DA 6).

Petitioner then informed the court that Mr. Stone had told him the day before that if "he didn't have discretion to make his decisions to me, that he would quit. So I feel . . . that I can't go on trial with him. I have no more confidence in him . . . I

1. Reference is to transcript of pre-trial hearings.
2. Reference is to petitioner D'Angelo's appendix below.

don't think I'll be represented properly" (DA 8). Without further inquiry, the judge denied the motion for continuance (DA 11).

Mr. Stone finally spoke, joining the application for continuance, stating that there were serious problems of trust and communication (DA 11-13).

Petitioner then tendered some further complaints, among which were Mr. Stone's attempts to waive a jury without petitioner's consent, his rejection and lack of preparation of the defense (petitioner claimed he had witnesses to "verify what I was doing."). Petitioner's tendered substitute counsel then reminded the court that there was "an affirmative defense" which "has not been prepared and . . . had been rejected by counsel [and] we may have an innocent man here who has not prepared his defense as I think . . . it should be prepared." The district judge concluded the matter by simply stating his opinion that the original attorney, Mr. Stone, would "perform his functions . . . to the best of his ability" (DA 14-23).

The jury trial then began, with petitioner "represented" by the lawyer he had attempted to replace. Approximately a dozen federal narcotics agents testified to their wiretaps of a co-defendant's telephone, extensive surveillance over a period of months, and the direct involvement with several codefendants, of an undercover agent, who purchased large quantities of narcotics from them. Several agents also testified to multiple arrests on September 3, 1980, during which they seized large quantities of heroin and paraphernalia, large sums of money, several guns and silencers—all of it from defendants not on trial.

The evidence connecting petitioner to all of this was very thin. He was observed meeting two of the codefendants at a Carvel Ice Cream store on August 1, when they bought ice cream (T.848). About an hour and a half later, petitioner returned to the parking lot of the ice cream store, as did one of the defendants, each in separate cars. Petitioner's hand was seen to

reach into the codefendant's car. None of the three agents who observed the meeting (one of whom had binoculars (T. 864-65) and all three of whom were within 75 feet of the meeting) saw anything in petitioner's hand (T. 774-81).

On August 12, a codefendant upon whom there was a wiretap, called petitioner and said he wanted to meet him. Petitioner said, "I'll meet you at the usual place" (DA 71-2). A few minutes later, petitioner left his apartment and drove to the vicinity of the ice cream store. He gassed up his car across the street. While doing so, he left the car in the gas station and walked across to the store. There, he met the codefendant who had called him and sat in his car for two or three minutes. The agents claimed to have seen petitioner carry a different bag to the car than the bag he returned with (DA 940-963).

The Government's theory was that at each of the foregoing two meetings, petitioner had transferred about 118 grams of heroin to the codefendants and that this heroin was in turn purchased by the undercover agent from some other codefendants shortly afterward, on August 1 and August 14.

Petitioner was his sole defense. He testified that he had known one of the codefendants (the one whose phone was tapped) since childhood (T.1300). He had nothing to do with narcotics. Rather, he was a construction worker and bartender, who lived in a modest apartment with his son and his wife, who also worked, as a secretary. He swore that on the first meeting with codefendants, they had asked him to borrow some pornographic films. He had gone home, got the films, returned and delivered them. On the August 12th meeting, they were returned (T. 1297-1313).

So much for the competent evidence. During the entire course of the trial—the Government's case took more than four full trial days and more than a dozen witnesses—defense counsel made only eight objections, most of which were to matters of form. He did not object when various federal agents testified that in their expert *opinions*, the two meetings of petitioner and

the codefendants at the ice cream store were narcotics passes (DA 32-33,37,40,43,44-45). Indeed, petitioner's counsel even started these prejudicial, incompetent inquiries by asking one of the agents to "take a guess" as to what had transpired at the ice cream store (DA 29). The answer he got, predictably, was the agent's belief that petitioner "was in possession of heroin at Carvel's where he gave the heroin to Vallone . . ." (DA 30). This was one of the agents who swore that he didn't *see anything* pass from petitioner to the other man (DA 36).

Emboldened by the absence of objections, the prosecution then heaped it on. The extensive criminal records (including narcotics offenses) of codefendants were introduced without objection. So were their aliases (DA 27-8). They were repeatedly described as "prior connected narcotics dealers" (DA 46-7). Nor was there a peep from Mr. Stone about the fact that codefendants were arrested (not with petitioner but at their homes and offices) in possession of guns, silencers, heroin, hundreds of thousand of dollars (T. 1208-1210); or even that one of them had confessed (T. 1208-10). Indeed, two agents were permitted to testify, without objection, that petitioner was part of the "Todisco heroin distribution ring" (DA 24, T.674). At least ten times, the Government was permitted to introduce, without objection, packages of heroin seized from codefendants (T. 582,622,684,772,1039, 1115,1178,1186,1210,1215), approximately fifty times that which defendant was alleged to have transferred. No limiting instructions were sought or given.

Petitioner was convicted on all three counts and was sentenced to ten years. He asserted on appeal, *inter alia*, that the district court should have made a factual inquiry into the truth of his claims about his unwanted lawyer, since the claims about rejection of the defense, lack of preparation, and assertion of authority to make all decisions were in and of themselves claims of ineffective assistance of counsel. He also complained that the trial judge should have intervened and inquired when he saw petitioner was

being buried by his own lawyer. Petitioner also asserted that the defense he received was a "farce and mockery" and, alternatively, that the Second Circuit should acknowledge, as has every other circuit and this Court, that a defendant is entitled not only to counsel but to reasonably competent counsel.

The Court below adhered to its "farce and mockery" standard by which it alone measures the effectiveness of defense counsel and held that petitioner's defense was "by no means ineffective" under that standard (App. p. 9). The court also opined, without a scintilla of evidence, that the failure of his counsel to object to inadmissible evidence and his eliciting of such evidence was "a conscious tactical decision" (App. p. 9). The court did not opine on what the tactical objectives might have been or whose interests they might have been advanced to serve.

REASONS FOR GRANTING THE WRIT

1. The Second Circuit's "farce and mockery" standard is in direct conflict with the law in every other circuit.

The Second Circuit has itself acknowledged that its interpretation of the Sixth Amendment's guaranty of the right to counsel is markedly different than the meaning given to the concept in every other circuit in the United States. See, *e.g. Curci v. United States*, 577 F. 2d 815,819(2d Cir. 1978); *United States v. Bubar*, 567 F. 2d 192,201-02(2d Cir.), *cert. denied*, 434 U.S. 872(1977). Moreover, the Second Circuit has repeatedly declined to reconsider its thirty-two year old test, *United States v. Wight*, 176 F. 2d 376(2d Cir. 1949), *cert. denied*, 338 U.S. 950(1950), in the face of demands from its own judges that it do so. See, *e.g. Brinkley v. LeFevre*, 621 F. 2d 45,47(2d Cir. 1980) (Weinstein, dissenting); *Rickenbacker v. Warden, Auburn Corr. Facility*, 550 F. 2d 62,66(2d Cir. 1976) (Oakes, dissenting), *cert. denied*, 434 U.S. 826(1977).

Although the other circuits are not in complete harmony in their interpretation of the precise content of the appropriate standard,

they unanimously reject the virtually nonexistent standard of the Second Circuit. *United States v. Bosch*, 584 F. 2d 1113(1st Cir. 1978); *Moore v. United States*, 432 F. 2d 730,736(3d Cir. 1970); *United States v. Williams*, 631 F. 2d 198(3d Cir. 1980); *Marzullo v. Maryland*, 561 F. 2d 540,543(4th Cir. 1977), *cert. denied*, 435 U.S. 1011(1978); *United States v. Burroughs*, 650 F. 2d 595,598 (5th Cir. 1981); *Beasley v. United States*, 491 F. 2d 687,696(6th Cir. 1974); *United States v. Williams*, 510 F. 2d 634,641(7th Cir. 1975); *United States v. Easter*, 539 F. 2d 663,666 (8th Cir. 1976), *cert. denied*, 434 U.S. 844(1977); *Cooper v. Fitzharris*, 586 F. 2d 1325,1330(9th Cir. 1978); *Dyer v. Crisp*, 613 F. 2d 275,278(10th Cir.) (*en banc*), *cert. denied*, 445 U.S. 945(1980); *United States v. Hinton*, 631 F. 2d 769(D.C. Cir. 1980).

The difference between the Second Circuit's "farce and mockery" test and the "reasonable competence" demanded in most circuits is a difference between night and day, for the "farce and mockery" test in practice is no standard at all. No court seems *ever* to have found that standard violated. See *Garton v. Swenson*, 367 F. Supp. 1355, 1364 (W.D. Mo. 1973). The "farce and mockery" test, formulated fourteen years before this Court's decision in *Gideon v. Wainright*, 372 U.S. 335(1963), is a meaningful, if stingy, measure of the validity of a trial where a defendant has *no right* to counsel (or perhaps where he has intelligently exercised his *pro se* right), but robs the constitutional guaranty of counsel of all meaning. A defendant, such as petitioner, who has an undoubted right to effective assistance of counsel, gains virtually nothing by that right; he is entitled to no fairer trial than if he had been entirely without counsel.

This is beyond question a matter of "fundamental importance in the administration of criminal justice" on which the circuits are in clear conflict and in which this Court has a responsibility, both to resolve the conflict and to give guidance. *Maryland v. Marzullo*, 435 U.S. 1011 (1978) (Opinion of Mr. Justice White,

joined by Mr. Justice Rehnquist, dissenting from denial of certiorari).

2. The standard of effective assistance applied below is contrary to decisions of this Court.

In *McMann v. Richardson*, 397 U.S. 759(1970), this Court said that a valid guilty plea based upon the advice of counsel required a "reasonably competent attorney"; the test is not whether the advice was right or wrong but whether it was "within the range of competence demanded of attorneys in criminal cases." *Id.* at 770-71. Most circuits have construed *McMann* as requiring "reasonable competence" by defense attorneys. *United States v. Bosch*, 584 F. 2d 1113(1st Cir. 1978); *Marzullo v. Maryland*, 561 F. 2d 540,543(4th Cir. 1977), *cert. denied*, 435 U.S. 1011 (1978); *Lovett v. Florida*, 627 F. 2d 706(5th Cir. 1980); *Ford v. Parratt*, 638 F. 2d 1115(8th Cir. 1981), *cert. filed.* 4/30/81 (No. 80-1816); *Cooper v. Fitzharris*, 586 F. 2d 1325, 1330(9th Cir. 1978). See also, *Tollett v. Henderson*, 411 U.S. 258(1973).

In any event, *McMann* removed all underpinnings of the "farce and mockery" standard by asserting what is obvious everywhere but in the Second Circuit: ". . . the right to counsel is the right to the effective assistance of counsel." 397 U.S. 759,771 n. 14.

Nor is the Second Circuit test consistent with this Court's many decisions holding that, absent a waiver, representation by a lawyer with conflicting interests is a deprivation of the Sixth Amendment right, *e.g. Glasser v. United States* 315 U.S. 60 (1942); *Holloway v. Arkansas*, 435 U.S. 475(1978); *Cuyler v. Sullivan*, 446 U.S. 335(1980). These decisions stand for the proposition that the right to counsel is a right to unhampered, unhobbled, loyal counsel, and that the disloyalty of counsel is alone a deprivation of the right. Yet a defense lawyer can be constrained by conflicts of interest, hobbled by ignorance, and

chained by incompetence without the trial even approaching a "farce and mockery". The two sets of standards cannot coexist in a coherent legal system.

3. The "farce and mockery" test is archaic and without a semblance of justification.

As noted *supra*, to hold, as the Second Circuit does, that one who has a constitutional right to assistance of counsel is not denied that right "unless the purported representation by counsel was such as to make the trial a farce and a mockery of justice . . .", *United States v. Wight, supra*, makes meaningless the most fundamental right an accused has.[3]

In the Second Circuit, a defendant is entitled to a warm body by his side, purporting to a member of the bar,[4] and purporting to represent the accused. That is all. If the as yet nonexistent case ever arises in which the defendant's trial is found a "farce and mockery", it will be found such not by virtue of what the defense counsel did or failed to do but because the trial judge presided over a shambles, a farce. If counsel's failings are not obvious on the record—and in the nature of things they rarely can be, see *Holloway v. Arkansas, supra*—and the trial judge maintains a modicum of orderliness in the trial, a conviction obtained as a result of incompetent or disloyal defense counsel will stand. The Second Circuit's interpretation makes a "farce and mockery" of *Gideon v. Wainright*, 372 U.S. 335(1963).

Despite its limited participation in giving content to the constitutional guaranty of the assistance of counsel, this Court is

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3. "Of all the rights that an accused person has, the right to be represented by counsel is far the most pervasive, for it affects his ability to assert any other rights he may have." Schaeffer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8(1956).

4. That the "representative" of the accused turns out to be an imposter apparently makes no difference. At least that is the holding of the New York Supreme Court App. Div. *People v. Felder*, 402 N.Y.S. 2d 411 (1978).

well aware of the serious problems of defense lawyer incompetence and disloyalty. See Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to our System of Justice?* 42 Fordham L. Rev. 227,234 (1973). Many so-called defense counsel are "walking violations of the Sixth Amendment," Bazelon, *The Defective Assistance of Counsel,* 42 U. of Cinn. L. Rev. 1,2(1973). The lawyer who represented petitioner was certainly in that class.

If any progress is to be made toward assuring defense lawyer effectiveness, the trial judge must be vigilant prior to and during the trial, and must conduct appropriate inquiries whenever the adversary system appears to be breaking down. See Schwartz, *Dealing With Incompetent Counsel—The Trial Judge's Role,* 93 Harv. L. Rev. 633 (1980). The "farce and mockery" standard, however, discourages judges from any such inquiries. Virtually none are necessary, as the decision below demonstrates. See also, *Garton v. Swenson,* 367 F. Supp. 1355,1360 (W.D.Mo. 1973), *remanded, Garton v. Swenson,* 497 F. 2d 1137(8th Cir. 1974). Indeed, the "farce and mockery" test actually discourages judicial inquiry, for if the record contains no references to counsel's reasons for action or inaction, or a defendant's dissatisfaction with counsel, no "farce and mockery" will be found. A conviction is thus insulated from review by judicial disinterest in the lawyer-client relationship or the performance of defense counsel.

4. There is a compelling need to resolve the issue promptly.

Despite repeated pleas to reconsider its standard of effectiveness, the Second Circuit has adamantly refused. This is tantamount to an invitation for this Court to review the matter.

The Second Circuit's test will of course eventually be rejected by this Court if, as appears to be the case, its intervention is necessary. Until that time comes, hundreds of defendants, like petitioner, will have their constitutional rights denied them. It

is doubtful that the overruling decision, when it comes, can rationally, fairly, or even legitimately be deemed prospective only. *Cf. Ivan v. New York*, 407 U.S. 203 (1972). The district courts will therefore be flooded with meritorious petitions under 28 U.S.C. § 2255 and finality will be seriously undermined.

Decision of this fundamental matter cannot responsibly be delayed. *Maryland v. Marzullo, supra.*

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted and the decision of the United States Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

STEVEN DUKE
Attorney for Petitioner

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1380-1, 1385-6, 1391-2, 1395—September Term, 1980

(Argued May 20, 1981 Decided May 22, 1981)

Docket Nos. 81-1052-1058

UNITED STATES OF AMERICA,

Appellee,

—v.—

ANTHONY TODISCO, ANTHONY VALLONE, JOHN CAMPOPIANO, SALVATORE SFERRAZZA, ALFONSE ZAMBUTO, LEONARD BARRACANO, and DAVID D'ANGELO,

Defendants-Appellants.

Before:

MOORE, TIMBERS and MESKILL,

Circuit Judges.

Appeals from judgments of conviction entered in the Southern District of New York, Robert J. Ward, *District Judge*, of violations of the federal narcotics laws.

Affirmed.

BARRY IVAN SLOTNICK, New York, N.Y. (Jay L. T. Breakstone, New York, N.Y. on the brief), *for appellant Todisco.*

MICHAEL YOUNG, New York, N.Y. (Goldberger, Feldman, Dubin & Young, New York, N.Y. on the brief), *for appellant Vallone.*

JULIA HEIT, New York, N.Y. (Edward Panzer, New York, N.Y., on the brief), *for appellant Barracano.*

MICHAEL L. SANTANGELO, New York, N.Y., *for appellant Campopiano.*

ANTHONY V. LOMBARDINO, Kew Gardens, N.Y., *for appellant Sferrazza.*

ALBERT A. GAUDELLI, Flushing, N.Y., *for appellant Zambuto.*

STEVEN B. DUKE, New Haven, Conn., *for appellant D'Angelo.*

RICHARD A. MARTIN, Asst. U.S. Atty., New York, N.Y. (John S. Martin, Jr., U.S. Atty., Lawrence F. Ruggiero, Mark F. Pomerantz and Mary Jo White, Asst. U.S. Attys., New York, N.Y., on the brief), *for appellee.*

PER CURIAM:

Appellants were convicted on various counts of a fifteen count indictment which charged them with conspiracy, and the distribution, possession and possession with intent to distribute heroin, in violation of 21 U.S.C. §§ 812, 841(a)(1), 841(b)(1)(A), 846 and 18 U.S.C. § 2 (1976). All appellants except D'Angelo pled guilty following the denial of their motions to suppress certain evidence, but preserved their right to appeal from the denial of their pre-trial motions. D'Angelo was convicted following a jury trial. From the judgments of conviction[1] entered on February 4,

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1. Appellants were sentenced as follows:

Todisco	Five concurrent 30 year terms; 10 years special parole.
Vallone	Two concurrent 20 year terms; 10 years special parole.

1981, Robert J. Ward, *District Judge*, all appellants have appealed. For the reasons below, we affirm the convictions of all appellants on all counts.

The indictment followed a four month investigation by 65 agents of the Drug Enforcement Administration (DEA). The investigation concluded on September 3, 1980, at which time a $900,000, 3 kilogram, heroin sale was slated to take place in several installments. The sale had been negotiated between undercover DEA agents and appellants and their associates. To the extent relevant to the issues on appeal, the details of that investigation will be set forth below. For convenience, we shall rule upon the issues raised on appeal by referring to the events before, on and after September 3, 1980.

1. *Events Before September 3, 1980*

We hold that no search warrant was required for the installation of two "pen registers" on appellant Todisco's telephones. *Smith v. Maryland*, 442 U.S. 735 (1979). We are not persuaded by appellant's effort to distinguish the *Smith* case on the ground that the pen register there was installed with the assistance of the telephone company. First, the Court in *Smith* held that the telephone company was acting as an agent of the police for Fourth Amendment purposes. *Id.* at 739, n.4. Moreover, the Court's reasoning—that the installation of a pen register is not a Fourth

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Barracano	Up to 10 years under the Young Adult Offender Act.
Zambuto	Two concurrent 7 year terms; 3 years special parole.
Sferrazza	Two concurrent 10 year terms; 3 years special parole.
Campopiano	15 years.
D'Angelo	Three concurrent 10 year terms; 3 years special parole.

Amendment search—applies with equal force to this case. In any event, appellants did not move for the suppression of the evidence obtained from the pen register and have not attempted to justify their delay. Their claim, even if it were meritorious, has been waived. *United States v. Rollins*, 522 F.2d 160, 165 (2 Cir. 1975), *cert. denied*, 424 U.S. 918 (1976).

There was ample probable cause to support the wiretaps on Todisco's telephone. They were authorized by Chief Judge Weinstein in the Eastern District of New York on August 7, 1980, and were extended by Judge Nickerson of the same court on August 26, 1980. Aside from the deference properly accorded to the determination by the issuing judge that there was probable cause, *United States v. Perry*, No. 79-1047, slip op. 6749, 6772 (2 Cir. Feb. 9, 1981), we hold, viewing the supporting affidavits as a whole and in a practical and common sense manner, *United States v. Steinberg*, 525 F.2d 1126, 1130 (2 Cir. 1975), *cert. denied*, 425 U.S. 971 (1976), and in light of the ongoing investigation, that there was probable cause. Todisco, a known narcotics dealer, had numerous contacts with individuals who were selling large quantities of heroin to undercover DEA agents. The pen register had disclosed numerous calls to other known narcotics dealers. Todisco also was seen publicly with known dealers. While these contacts, as appellants suggest, are subject to an innocent interpretation when viewed in isolation, in view of the ongoing investigation and the close proximity in time between many of the contacts and the known sales, we hold that there was probable cause to believe that Todisco was involved.

We also hold that the affidavits adequately alleged that normal investigative procedures had been or would be ineffective. The affidavits did disclose the standard investigative techniques which had been employed and the paucity of evidence which had resulted, or could be expected to result, therefrom. *United States v. Vasquez*, 605 F.2d 1269, 1282 (2 Cir.), *cert. denied*, 444 U.S.

981 (1979). Appellants' observation that the language employed in the affidavit in this regard resembled that used in another case is irrelevant, especially since there is no claim that the assertions are untrue or do not apply to the facts herein.

We also hold that the application was properly authorized. Order No. 799-78 clearly was adequate to empower the Assistant Attorney General of the Criminal Division, Philip Heymann, to authorize the application. *In re Weir*, 520 F.2d 662, 667 (9 Cir. 1975). There is no question here, as there was in *United States v. Giordano*, 416 U.S. 505 (1974) (relied upon by appellants), that the Assistant Attorney General did not actually sign the memorandum approving the application. There is no requirement that the authorizing official must recite his reasons for approving a recommended wiretap application. We decline appellants' invitation to hold that the district court erred in refusing to hold a full evidentiary hearing based on appellants' unfounded speculation.

Finally, with respect to the events before September 8, 1980, we hold that the district court's finding of fact that the "August 8, 1980" date on the order authorizing the wiretaps was a ministerial error and therefore insignificant, was not clearly erroneous.

2. *Events on September 3, 1980*

We hold that the warrantless arrest of Todisco in Apartment 3C at 610 Waring Avenue was lawful. There can be no doubt that, under the precedents in this Circuit, the district court did not err in refusing to suppress the "fruits" of that arrest, including the evidence uncovered in the subsequent search of the apartment. *United States v. Campbell*, 581 F.2d 22, 26 (2 Cir. 1979); *United States v. Reed*, 572 F.2d 412, 424 (2 Cir. 1978), *cert. denied*, 439 F.2d 913 (1978). Todisco was known to be engaged in a serious crime at the time of his arrest. One of his cohorts had just been arrested with a gun. And, most compellingly, Todisco was in a position to destroy substantial evidence of his guilt.

Appellants' assertions that the DEA agents somehow "manufactured" these events are belied by the facts. The agents had no way of knowing, before the events occurred, that Todisco, at the time of the arrests, would be secreted with a large quantity of heroin waiting for co-appellant Vallone to return. While an arrest warrant could have been obtained before September 3, we decline, on the fact of this case, to interfere with the discretion accorded narcotics agents to determine when they will make an arrest. *See United States v. Santiago*, 327 F.2d 573 (2 Cir. 1964). That is especially so here, where there simply is no basis for the claims of appellants.

Since the arrest of Todisco, and the entry subsequent to his arrest, were lawful, there is no question that the search of Apartment 3C, pursuant to a warrant issued on September 3, 1980, also was lawful.

Appellants' claims regarding the warrantless arrest of appellant Sferrazza, and the search of the Zambuto residence subsequent to that arrest, also are without merit. Based on the wiretap evidence, and the DEA agents' observations of the meeting between Sferrazza and Todisco on the morning of the September 3 heroin sale, the agents clearly had probable cause to arrest Sferrazza. In the district court Sferrazza unequivocally withdrew his claim that the warrantless arrest in the Zambuto residence somehow violated his Fourth Amendment rights. He also withdrew his claim that evidence seized subsequent to that arrest, and his confession to DEA agents, should be suppressed for that reason.

In view of the claims of other appellants regarding the Sferrazza arrest, however, we hold that, even assuming that a warrant was required to arrest Sferrazza in Zambuto's home absent exigent circumstances, *Steagold v. United States*, 49 U.S.L.W. 4418 (U.S. April 21, 1981), the arrest here nevertheless was proper. In that regard, we hold that Judge Ward's

findings of fact, stated on the record on December 4, 1980, that exigent circumstances justifying the warrantless arrest clearly existed under the standards set forth in *United States v. Reed, supra,* were not clearly erroneous.

We hold that the evidence seized in the Zambuto home following the Sferrazza arrest was admissible. Mrs. Zambuto's affirmative assistance in the discovery of $300,000 in cash hidden in the Zambuto basement is compelling evidence that she voluntarily consented to the search, *United States v. Rothberg,* 460 F.2d 223 (2 Cir. 1973). The money therefore was admissible. The district court found that Mrs. Zambuto's testimony that she was coerced by the DEA agents to assist in their search was "unbelievable." This finding was based in part on her demeanor and her unresponsive answers to questions on cross-examination. The district court challenged "any who read the record [to] find otherwise." Having carefully read the record, and according deference to the district court's determination of witness credibility, *Alessi v. United States,* 628 F.2d 1133, 1135 (2 Cir. 1980), we hold that the district court's admission of this evidence was proper.

Similarly, we hold that Sferrazza knowingly and intelligently waived his *Miranda* rights before making incriminating statements to the DEA agents. Based on Sferrazza's in-court behavior and the recorded telephone conversations involving him, the district court had an ample basis for discounting appellant's claim that he did not understand English.

We further hold that the execution of the search warrant covering the Zambuto home on the evening of September 3 did not violate anyone's rights under the Fourth Amendment. The district court's finding of fact that the search began before 10 P.M. was not clearly erroneous, in the light of testimony that the agents were notified by telephone that the warrant had been approved by Magistrate Chrein at 9:50 P.M.

The search of Todisco's home, pursuant to a warrant issued on September 3, also was lawful. There is no inconsistency between the September 3 application for that warrant and the DEA agents' earlier application for a wiretap order for Todisco's telephone. There was no evidence, prior to Todisco's arrest on September 3, that he ever physically possessed heroin. There is no merit in appellants' claim that the agents were required to discuss with the magistrate on September 3 the contents of the earlier, irrelevant, application for a wiretap.

3. *Events After September 3*

We hold that the district court did not abuse its discretion in refusing to grant a continuance after the filing of a superseding indictment on November 25, 1980. First, the Speedy Trial Act, 18 U.S.C. § 3161(c) (1980 Supp.), does not divest the district court of its discretion to grant or refuse a continuance. The district court's inquiry and ruling on the motion for a continuance was consistent with the guidelines promulgated by this Circuit under the Speedy Trial Act. Guidelines Under the Speedy Trial Act, II L, comment, at 31 (January 16, 1979). While those guidelines do not have the force of law, they are entitled to appropriate respect. Appellants' arguments do not convince us that those guidelines are incorrect or inconsistent with the statute, or that 18 U.S.C. § 3161(c) stripped the district court of its discretion under the circumstances of this case.

In view of the fact that the charges in the superseding indictment were substantially the same as those in the original indictment and in view of the fact that substantial discovery had taken place, we hold that the district court did not abuse its discretion in refusing to grant a continuance.

Similarly, the district court did not abuse its discretion in refusing to grant D'Angelo a continuance on the eve of trial to obtain new counsel. The court gave D'Angelo an ample and continuing opportunity to air his complaints about counsel. These

amounted to no more than a disagreement about tactics and an unspecified "loss of confidence." The court had ample opportunity to observe counsel and to note his competence during the months before trial when the same counsel represented D'Angelo, without incident. In addition, the court did its utmost to accommodate D'Angelo's concerns without disrupting the scheduling of this complex jury trial. We repeatedly have expressed our concern that district courts be wary of eleventh hour requests for new counsel. *E.g., United States v. Carroll,* 510 F.2d 507, 510 (2 Cir. 1975); *United States v. Llanes,* 374 F.2d 712, 717 (2 Cir. 1967). Under the circumstances of this case, we hold that the district court's refusal to grant a continuance was a proper exercise of his discretion.

We also hold that D'Angelo's representation at trial was by no means constitutionally ineffective under this Circuit's standard. *E.g., United States v. Bubar,* 567 F.2d 192, 202 (2 Cir. 1977), *cert. denied,* 434 U.S. 872 (1977). We find no merit in the claim that the district court deprived D'Angelo of a fair trial by failing to exclude evidence which appellant's counsel made a conscious, tactical, decision to present.

We further hold that there was sufficient evidence to support the jury verdict convicting D'Angelo. First, the court did not err in admitting the hearsay statements of D'Angelo's co-conspirators. There was ample independent evidence of D'Angelo's participation in the conspiracy to permit the admission of these statements. *United States v. Geaney,* 417 F.2d 1117 (2 Cir. 1969). The court and jury were free to reject D'Angelo's "innocent" interpretation of the telephone calls and clandestine meetings which D'Angelo had with Todisco and his associates. *United States v. Weisman,* 624 F.2d 1118, 1130 (2 Cir. 1980), *cert. denied,* ..... U.S. ..... (1981). In asking us to accept his innocent gloss on the evidence before the district court, D'Angelo in effect is asking us to view those events in isolation and to disre-

gard the fact that they occurred during substantial heroin sales to undercover agents. We hold that there was sufficient evidence upon which the jury could find D'Angelo guilty beyond a reasonable doubt.

Finally, we hold that Todisco's claim that his guilty plea was not knowingly and intelligently made is frivolous. Todisco, represented by counsel, engaged in a colloquy with the district court which more than adequately demonstrated that he understood the nature of the charges to which he pled guilty.

All appellants were convicted of serious offenses on the basis of overwhelming evidence of guilt—six by pleading guilty and one after a jury trial. Our careful examination of the record satisfies us that all appellants were accorded a fair hearing, by a conscientious district judge, on their pre-trial motions and, in the case of one appellant, at his jury trial. We affirm the convictions of all appellants on all counts. We order that the mandate issue forthwith.

Affirmed.

UNITED STATES COURT OF APPEALS

FILED
JUL 29 1981
A. DANIEL FUSARO, CLERK
SECOND CIRCUIT

United States Court of Appeals

Second Circuit

No. 81-1052 thru 81-1058

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 29th day of July, one thousand nine hundred and eighty-one.

UNITED STATES OF AMERICA,

Plaintiff-Appellee

v.

ANTHONY TODISCO, a/k/a Lefty, SAL SFERRAZZA, a/k/a Grandpa, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a Uncle John, a/k/a Echoes, ANTHONY VALLONE, a/k/a Tutti, LENNY BARRACANO, a/k/a the Kid, DAVID D'ANGELO, HECTOR TORRES, a/k/a Picaro, a/k/a Pic, a/k/a Woody, a/k/a Shvartza, LUIS ACOSTA, a/k/a Louis Molina a/k/a Angel,

Defendants

ANTHONY TODISCO, a/k/a Lefty, SAL SFERRAZZA, a/k/a Grandpa, ALPHONSE ZAMBUTO, JOHN CAMPOPIANO, a/k/a Uncle John, a/k/a Echoes, ANTHONY VALLONE, a/k/a Tutti, LENNY BARRACANO, a/k/a the Kid, DAVID D'ANGELO,

Defendants-Appellants

Petitions for rehearing containing suggestions that the action be reheard in banc having been filed herein by counsel for the defendants-appellants Anthony Todisco, Salvatore Sferrazza, Alphonse Zambuto, David D'Angelo, and Anthony Vallone,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petitions for rehearing are DENIED.

It is further noted that the suggestions for rehearing in banc have been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

by FRANCIS X. GENDHART
Chief Deputy Clerk

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS
CLERK

No. 81-617

In the Supreme Court of the United States

OCTOBER TERM, 1981

DAVID D'ANGELO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was deprived of the effective assistance of counsel.

1. After a jury trial in United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to possess and distribute heroin, in violation of 21 U.S.C. 846, and on two counts of possession of heroin with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of 10 years' imprisonment, to be followed by a three-year special parole term. The court of appeals affirmed (Pet. App. 1-10).

a. The indictment in this case charged petitioner, together with eight co-defendants, with participating in a heroin distribution conspiracy.[1] Petitioner's co-defendants pleaded guilty following hearings on various pretrial motions. On the day before petitioner's trial was scheduled to commence, and after a jury had been selected and sworn, petitioner informed the district court that he wished to obtain new counsel because he and his attorney, Joseph Stone, disagreed on certain matters. Despite the fact that the trial date had been set weeks earlier, the court agreed to permit petitioner to seek new counsel (Tr. 510).

The next morning, petitioner appeared with Mr. Stone and another attorney, who said that he would enter the case only if the court would declare a mistrial and grant a two to three week continuance, explaining that he would not go to trial without participating in the selection of the jury and that the continuance was necessary to prepare an unidentified "affirmative defense" (Tr. 505-506). Petitioner told the court that he and Stone had disagreed on several matters of trial strategy.[2] Noting that the jury had already been selected and sworn, and that during the three months that Stone had been petitioner's counsel of record he had represented petitioner's interests diligently and would continue to do so, the court denied the application for substitution of counsel and a continuance (Tr. 523).

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[1]Co-defendant Anthony Todisco was charged with organizing a continuing criminal enterprise, in violation of 21 U.S.C. 848. The remaining counts of the indictment charged individual defendants with possession of heroin.

[2]According to petitioner, Stone initially had agreed with counsel for the other defendants to waive a jury, contrary to petitioner's wishes (Tr. 519). The district court pointed out to petitioner that he in fact elected not to waive a jury (Tr. 520). Petitioner also claimed that he and Stone differed about whether to enter into certain stipulations with the government and whether to call certain witnesses in petitioner's defense (Tr. 519-520).

b. The government's evidence at trial showed that co-defendant Todisco headed a large-scale heroin distribution organization that supplied almost pure heroin to drug dealers in the New York City area. Between May and September 1980, an undercover agent made six purchases of increasingly larger quantities of heroin. The first five purchases were of one ounce on May 14, 1980, and one-eighth of a kilo each on May 27, June 26, August 1 and 14, 1980. The sixth purchase, on September 3, 1980, involved half a kilogram of heroin at a purchase price of $137,500. This purchase was the first installment of a three kilogram transaction negotiated for a total price of $825,000. After the half-kilo purchase was completed, the defendants were arrested. Subsequent searches led to the seizure of the remaining two and one-half kilos of heroin.

Petitioner was connected to the conspiracy by pen register evidence that showed that co-defendant Todisco made four calls to petitioner's residence on the day before the June 26 sale and five calls to petitioner's residence on the day of the August 1 sale (Tr. 676-679, 748-750). After the last of the calls on August 1, petitioner met briefly with Todisco and co-defendant Anthony Vallone at an ice cream store parking lot. Todisco returned to his home and called co-defendant Hector Torres; shortly thereafter the undercover agent received a call from co-defendant Luis Acosta setting a time for the heroin purchase. Fifteen minutes later, Vallone met again with petitioner in the ice cream store parking lot. Petitioner parked his car next to Vallone's vehicle and quickly reached his hand into Vallone's car. Immediately after petitioner withdrew his hand from Vallone's vehicle, both cars departed (Tr. 774-780, 785-787). Shortly thereafter, Vallone drove co-defendant Torres to

co-defendant Acosta's office, where Torres delivered the heroin to the undercover agent (Tr. 769-772).[3]

Two days prior to the August 14 sale, Todisco called petitioner and arranged to meet petitioner "where we usually go" (C.A. App. 71-72).[4] Soon afterward, petitioner, carrying a blue vinyl package, met Todisco at the ice cream store parking lot, got into Todisco's car, and left a few minutes later carrying a larger black vinyl package (Tr. 940-943). When petitioner was arrested, he initially gave a false name and denied knowing Todisco, even though a telephone list that he had in his possession contained Todisco's nickname and telephone number (Tr. 1231; see Tr. 674).

c. In his opening statement, defense attorney Stone emphasized to the jury that he represented only petitioner, not the other defendants who were charged in the indictment. He pointed out that petitioner was not arrested in possession of either narcotics or weapons and lacked the financial resources that a narcotics dealer would be expected to possess. He suggested that the government's evidence against petitioner would consist of innuendos concerning which the jurors would be asked to use their imaginations rather than their common sense, and he urged the jurors to distinguish between that evidence and the other evidence that would be produced to show that the other defendants had engaged in a heroin distribution scheme (Tr. 549-555).

In cross-examining the government agents who testified, Stone brought out that petitioner was not seen with anything in his hand when he met Vallone at the ice cream store

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[3]Torres explained to the agent that the transaction had been delayed because some people from Baltimore had purchased all of the heroin that his source had on hand and his source had to obtain the one-eighth kilo from one of his partners (Tr. 769-770).

[4]By this time, a court-authorized wiretap had been placed on Todisco's telephone.

parking lot (Tr. 693, 713, 801) and was not seen to give anything to or receive anything from Vallone or Todisco (Tr. 697). In response to Stone's questioning, one agent stated that his testimony that heroin was passed at that meeting was an opinion based upon his imagination, experience and expertise (Tr. 698, 701). Counsel then showed that despite his expertise the agent made numerous errors of recollection in recounting petitioner's activities (Tr. 720-722). In addition, attorney Stone brought out that petitioner was never mentioned in overheard telephone calls between Todisco and Vallone (Tr. 1064), that a pen register on petitioner's telephone showed no calls to other members of the conspiracy (Tr. 1246-1247), and that the pen register revealing calls from Todisco to petitioner did not show whether the calls were in fact completed or, if they were, that it was Todisco and petitioner rather than members of their families who participated in the conversations (Tr. 753-754, 759-761). Counsel showed that, in contradistinction to the other defendants, no search was made or attempted of petitioner's apartment (Tr. 1245-1246).

Finally, Stone established that in order for the government to charge and convict Todisco for operating a continuing criminal enterprise, the government had to prove that five other persons participated in the enterprise. Counsel developed the theory that petitioner was charged because the agents may have thought that Torres and Acosta, as customers of Todisco, were not includable among the five participants in the enterprise (Tr. 1120-1122, 1132-1133, 1200).[5]

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[5]Against Stone's advice (Tr. 1294), petitioner took the stand and testified that his meetings at the ice cream store parking lot with Todisco and Vallone were for the purpose of delivering and receiving pornographic films (Tr. 1312-1313). The credibility of that testimony was severely impeached on cross-examination (see Tr. 1322-1332, 1335-1337, 1339, 1342-1343). Petitioner also testified on direct examination that he was in possession of marijuana cigarettes when he was arrested

In his summation to the jury, Stone reiterated the themes of his opening statement. He conceded that the government had established the existence of a large-scale heroin conspiracy, but argued that petitioner was not shown to have been a part of it. He suggested that the agents, in their overzealousness, had charged petitioner in order to sustain the continuing criminal enterprise charge against Todisco. In support of this argument, he emphasized omissions from the agents' reports, mistaken dates, times and places in their testimony, and inconsistencies between the testimony of different agents with respect to key aspects of the case. He also stressed that no search of petitioner's apartment was attempted, that petitioner's name was never mentioned by any of the other conspirators, and that petitioner was never seen at any of the places where heroin was seized. Counsel also pointed out that rather than possessing the wealth that a narcotics dealer would be expected to possess, petitioner's resources were modest enough that his wife was employed in a fulltime job. All of this, Stone argued, created at least a reasonable doubt concerning petitioner's guilt (Tr. 1403-1422).

2. Petitioner contends that his trial attorney rendered ineffective assistance and that the court of appeals erred in rejecting this claim on the basis of its longstanding "farce and mockery" test (see Pet. App. 9, citing *United States* v. *Bubar*, 567 F. 2d 192, 202 (2d Cir.), cert. denied, 434 U.S. 872 (1977)). Petitioner urges the Court to grant review in order to resolve a conflict between the Second Circuit and the other courts of appeals concerning the proper test for

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and believed that that was the reason for his arrest (Tr. 1309-1310). When asked on cross-examination whether he remembered the name of his marijuana supplier, petitioner replied, "Is he going to give me his name, address and phone number?" (Tr. 1344) — thereby undercutting counsel's attempt to establish that the undercover agent should have made inquiries of Acosta that would have revealed petitioner's identity had petitioner in fact been part of the conspiracy (Tr. 1119-1120).

evaluating ineffective assistance of counsel claims. This case, however, does not present an appropriate vehicle for resolving any such conflict, since petitioner's ineffective assistance argument properly would have been rejected under any standard. Trial counsel's actions of which petitioner complains (Pet. 4-5) were all part of a well developed strategy of emphasizing the strength of the government's case against the other defendants and attempting to show that, by contrast, the case against petitioner rested on speculation. This was not merely a reasonable strategy, it was the only one likely to offer any chance of success. That in the end it was not successful hardly establishes that the assistance of counsel was constitutionally ineffective.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

NOVEMBER 1981

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No. 81-617

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v.

UNITED STATES OF AMERICA,
Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

The Government contends that petitioner was effectively represented "under any standard" of effective assistance of counsel.

1. The Government's memorandum in opposition contains several inaccuracies and distortions suggesting that petitioner had a fair trial with effective assistance of counsel. The opposite is plainly the case.

The Government implies that petitioner chose a jury, then, immediately thereafter, sought to get rid of his lawyer and substitute another (p. 2). In truth, the jury had been selected eight days before the trial began, by all of the defendants. The trial court was happy to delay the trial for eight days to permit the defendants to plead guilty, but was unwilling to allow petitioner any time in which to prepare a defense through counsel.

The Government characterizes petitioner's dissatifaction with his counsel as one concerning merely "matters of trial strategy" (p. 2). Whether a jury is waived may be in some sense a matter of "trial strategy," but it is incontrovertibly a fundamental right of the defendant, not of his lawyer. Whether one puts on a defense may, in some remote sense, be a matter of "trial strategy," but it is certainly a fundamental right of the accused, not of his lawyer.

Equally misleading is the reference to petitioner's "unidentified" defense (p. 2), which his unwanted lawyer had refused to prepare or present. New counsel attempted to explain the nature of the defense to the trial judge, but the judge refused to hear a description of it (DA 6). In short, it didn't matter to the trial judge or the court below that petitioner's unwanted attorney had insisted on the right to make all decisions (DA 19), had attempted to enter into stipulations and to waive a jury without consulting the accused (DA 19), had not prepared the defense (DA 19-20, 22), and that "we may have an innocent man here who has not prepared his defense" (DA 22).

It is neither accurate nor relevant to suggest that petitioner's unwanted counsel had represented him diligently "during the three months that [h]e had been counsel of record" (p. 2). The record indicates that during the pretrial hearings, petitioner's counsel played almost no role and, indeed, was *absent* much of the time. Moreover, it was only after selection of the jury, during the heavy-handed plea-bargaining phrase, that petitoner's counsel manifested his lack of fidelity to his client, his incompetence, and his lack of preparation.

2. In its efforts to show that petitioner's counsel was competent, the Government succeeds only in establishing petitioner's probable innocence (p. 4-7). Its claim that counsel was competent and effective under "any standard," *e.g.*, "reasonable competence," however, is ludicrous. A lawyer

who, during trial, is drunk, *Hudspeth v. McDonald*, 120 F.2d 962, 967 (10th Cir.), *cert. denied*, 314 U.S. 617 (1941) ("What of it?", the court profoundly remarked), or asleep, *United States v. Katz*, 425 F.2d 928, 931 (2d Cir. 1970), can satisfy the "farce and mockery" test, but it surely is not the case that failure to prepare a defense or to prepare for trial, as here, is "reasonable competence." Nor can it be "reasonable competence" to invite numerous drug agents to give their opinions, based upon their professional "experience," that the defendant is guilty. That, and more, is what petitioner's counsel did to him and to his defense.

3. It is noteworthy that the Government does not defend the "farce and mockery" test which was applied to petitioner's claims. Nor does it deny that the Second Circuit's adherence to that test flouts not merely the unanimous view of all other Circuits but the considered expressions of this Court. Nor does the Government contest petitioner's assertion that the matter is one of fundamental importance and urgency. The only basis upon which the Government opposes the petition is its claim that petitioner's arguments "would properly have been rejected under any standard" (p. 7). As petitioner has shown, that is preposterous.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted and the decision of the court below reversed.

December, 1981

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